EARTHJUSTICE

Via Email

December 8, 2020

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Re: Supplemental Letter on Clean Water Act Section 404 Permit No. SPL-2008-0816-MB for the Rosemont Copper Mine

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Dear General Helmlinger, Mr. Torres, Ms. Leuders, Mr. Humphrey, Chairman Grijalva, Mr. Huckleberry, Ms. LaWall, Ms. Nassen, Ms. Bhat, and Mr. Smith:

On behalf of the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe (collectively, "the Tribes"), we submit this supplemental letter regarding the Army Corps of Engineers' ("Corps") Clean Water Act section 404 permit number SPL-2008-0816-MB ("404 Permit") for the Rosemont Copper Mine.

The Santa Rita Mountains, including the Rosemont mine site, are home to some of the highest quality streams and wetland ecosystems in Arizona. As a result, the Corps approved a preliminary jurisdictional determination (PJD) for the mine site, concluding that there are 101.60 acres of potentially jurisdictional waters in and around the mine site, including 154 individual ephemeral streams and springs that encompass 18 stream miles and two wetlands. The ephemeral and intermittent streams at the mine site are of great ecological importance to the aquatic and terrestrial ecosystem, moving water, sediment, and debris through the stream network and providing connectivity within the watershed. These life-sustaining waters are also of great cultural and religious importance to the Tribes, who hold as sacred these rare features in an otherwise arid landscape.

The Corps and the Environmental Protection Agency (EPA), however, recently promulgated the Navigable Waters Protection Rule ("Navigable Waters Rule" or "Rule"), which would categorically eliminate protections for these ephemeral streams, along with thousands of other streams in the Cienega Creek Watershed, along the Santa Cruz River, and throughout the desert southwest. The Rule violates the Clean Water Act, conflicts with the scientific record, inexplicably departs from the agency's prior findings, and creates a regulatory void with unacceptable consequences for the Nation's waters, as proved by the facts of this case.[1]

The Tribes are concerned that Rosemont may ask the Corps to hastily reverse its 2010 approval of the PJD for the mine and determine that the agency has no jurisdiction over the site under the Clean Water Act before the end of the current administration. If Rosemont makes any such request, or the Corps unilaterally pursues such an agenda, we request prompt notification, an opportunity for a public hearing, and government-to-government consultation on this critical issue before a decision is made. We strongly oppose any such jurisdictional waiver by the Corps, as it would run contrary to an extensive scientific record, violate the Clean Water Act, overstep EPA's authority in this special case, and undermine the Forest Service's approval and Fish and Wildlife Service's Biological Opinion for the mine. The Tribes thus urge the Corps to retain the PJD for the Rosemont Copper Mine or, at the very least, refrain from taking any further action until the incoming Biden administration can review the Rule.

[1] On June 19, the District of Colorado issued an order staying the Rule on the grounds that it is unambiguously foreclosed by the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006). *See Colorado v. EPA*, No. 1:20-cv-01461-WJM-NRN, Order Granting As-Construed Motion for Stay of Agency Action, Dkt. 61 (June 19, 2020) [hereinafter "Colorado Stay Order"].

A. The Ephemeral and Intermittent Streams on the Rosemont Mine Site are Integral to the Watershed's Hydrology.

The Santa Rita Mountains and Rosemont Mine site are a place of remarkable scenic beauty and ecological richness, whose wildlife, water, and sacred places have sustained Native American cultural and religious life for over 10,000 years.[2] The proposed mine would not only mark the loss of some of the most significant religious and cultural sites to Native American tribes, it would degrade the Cienega Creek watershed and destroy an intricate network of drainages containing some of the highest quality streams and wetland ecosystems in Arizona.[3]

The Corps approved a PJD for the mine in 2010.[4] The PJD explains that the network of ephemeral waters at the site support and sustain intermittent and perennial waters, such as the perennial Cienega Creek,[5] as they travel to the Traditional Navigable Waters of the Santa Cruz River.[6] The PJD states that the site contains 101.60 acres of potentially jurisdictional waters, including 154 individual ephemeral streams and springs that encompass 18 stream miles, and two wetlands (Scholefield Spring No. 1 and Fig Tree Spring).[7] EPA also stated in comments on the Rosemont mine that "[a]ll stream channels in the Davidson Canyon watershed are variously connected by surface and shallow subsurface hydrologic pathways to downstream waters,"[8] citing twenty years "of hydrologic monitoring along Cienega Creek."[9]

Evidence submitted to the Corps also shows that Barrel Canyon is likely an intermittent, rather than ephemeral, stream. Pima County, where the mine is located, maintains that Barrel

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[2] Suzanne Griset, SWCA Envtl. Consultants, William Gillespie, Coronado Nat'l Forest, and Mary Farrell, Trans-Sierran Archaeological Research, National Register of Historic Places Registration Form for Ce:Wi Duag ("Long Mountain" in O'odham) at 3–15 (2012) [hereinafter "NRHP Registration Form"] (attached as Exhibit 1).

[3] Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Envtl. Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States at 27 (Nov. 30, 2017) [hereinafter "EPA 2017 Significant Degradation Letter"] (attached as Exhibit 2).

[4] U.S. Forest Serv., Final Environmental Impact Statement for the Rosemont Copper Project Vol. 1 at 11 (2013) [hereinafter "FEIS Vol. 1"] (excerpt attached as Exhibit 3).

[5] Ariz. Dep't Envtl. Quality, eMAP (last visited Dec. 4, 2020), https://adeq.maps.arcgis.com/apps/webappviewer/index.html?id=e224fc0a96de4bcda4b0e37af3a4daec&showLayers=Counties;Flow%20Regimes%20-%20Perennial%20Intermittent%20Ephemeral%20Streams (categorizing Cienega Creek as perennial); *see also* U.S. Forest Serv., Final Environmental Impact Statement for the Rosemont Copper Project Vol. 2 at 490-91, fig.67 & tbl.106 (2013) [hereinafter "FEIS Vol. 2"] (listing reaches of Cienega Creek near the mine site as perennial) (excerpt attached as Exhibit 4).

[6] WestLand Resources, Inc., Preliminary Jurisdictional Determination for the Rosemont Project, Pima County, Arizona at 4 (2009) [hereinafter "PJD"] (attached as Exhibit 5).

[7] PJD at 4.

[8] EPA 2017 Significant Degradation Letter at 10.

[9] *Id.* at 11.

Canyon qualifies as an intermittent water body, noting that the 2000 Sonoran Desert Conservation Plan mapped part of Barrel Canyon as intermittent.[10] The County provided the Corps with information and data supporting this categorization, including direct measurements and visual observations of flow from the U.S. Geologic Service and stream gage data showing Barrell Canyon flows persisting for two weeks following rainfall.[11] Additionally, although the Corps has identified it as ephemeral, Barrel Canyon is noted as an intermittent stream in the National Hydrography Dataset.[12] While data points for Barrel Canyon may be limited, the available information demonstrates the stream is intermittent.

EPA explained in its 2015 Connectivity Report, which included a "state-of-the-art" review of 1,200 scientific articles, that the scientific literature "unequivocally" shows that ephemeral streams exert a "strong influence on the integrity of the Nation's waters" and are "critical to the health and stability of arid and semiarid watersheds and ecosystems."[13] During typical storm events, ephemeral streams, like those found at the mine site, convey large flows of water, providing surface and subsurface flows to downstream waters, as well as recharge for groundwater aquifers.[14] "In arid land streams, this hydrologic connection occurs episodically during flood pulses, yet still provides a substantial amount of the mass, momentum, energy and organisms delivered to downstream perennial waters, as well as to ground-water recharge."[15]

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[10] Letter from C.H. Huckelberry, Cty. Adm'r, Pima Cty., Ariz., to William James, Nat'l Mining Expert, U.S. Army Corps of Eng'rs, and Kerwin Dewberry, Forest Supervisor, U.S. Forest Serv. at 8 (Sept. 28, 2017) [hereinafter "2017 Pima Letter"] (attached as Exhibit 6).

[11] *Id.* at 8–13.

[12] U.S. Geologic Survey, The National Map (last viewed Dec. 4, 2020), https://viewer.nationalmap.gov/basic/?basemap=b1&category=nhd&q=&zoom=14&bbox=-110.72356224,31.84307631,-110.62803268,31.89592298&preview=NHD&avail=&refpoly#/nhd; *see also* U.S. Geologic Survey, The National Map, Legend (NHD) (last viewed Dec. 4, 2020), https://hydro.nationalmap.gov/arcgis/rest/services/nhd/MapServer/legend.

[13] U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence at ES-2, B-39, B-59 (Jan. 2015) [hereinafter "EPA Connectivity Report"] (attached as Exhibit 7).

[14] Lainie Levick et al., The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest at 20, 24 (Nov. 2008) [hereinafter "2008 Ephemeral Streams Report"] (attached as Exhibit 8); *id.* at 14 (explaining that "the vast extent of . . . arid and semi-arid watersheds makes their runoff production significant, and their proper management important.").

[15] *Id.* at 24.

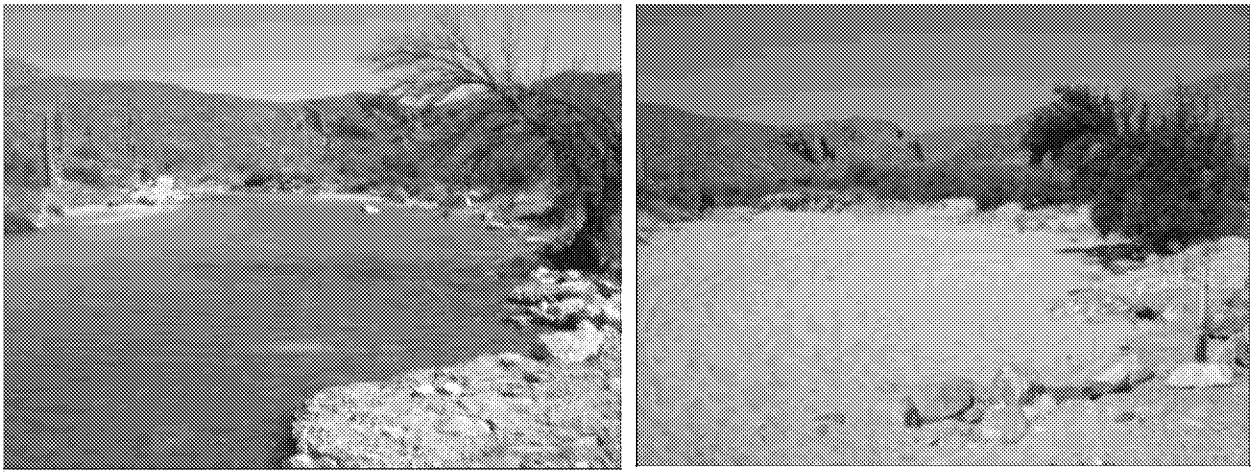

Figure 19. Photographs of an ephemeral stream, same location during flow (left), and dry (right), Tucson, Arizona.
[16]

A series of videos depicts the intense, but typical flows in ephemeral streams endemic throughout southern Arizona and the mine site.[17]

These streams also "heavily influence" the chemical composition of downstream waters, particularly during storm events.[18] For example, organic material accumulates in ephemeral streams during dry periods, only to be carried downstream in great quantities during subsequent storm events.[19] The Forest Service noted that the ephemeral channels at the mine site serve this "major function" by transporting sediment throughout the aquatic system during these storm events.[20] The streams at the mine site "have a cyclical pattern of infill and erosion. . . . [S]ediment movement usually occurs as pulses associated with flash thunderstorm flows that push large amounts of coarse sediment through the system. Long-term stream sedimentation behavior is based on the equilibrium between erosion and deposition of sediment delivered to the system."[21] These "first flush" events "are important in transporting and transforming large amounts of unique materials for long distances downstream, which then can have significant [water quality] effects."[22]

Ephemeral streams provide a wide range of functions, including hydrological connectivity within a basin that "facilitates the movement of water, sediment, nutrients, debris,

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[16] *Id.* at 26.
[17] The following link provides a video of an intense, but typical, flow in Walnut Gulch, an ephemeral tributary of the San Pedro River in Arizona. http://www.tucson.ars.ag.gov/unit/Movies/Aug_1_1990_with_animation.wmv. There is also a video prepared by the United States Geological Survey of runoff in an ephemeral tributary near Sierra Vista during a typical monsoon storm. https://www.youtube.com/watch?v=0kd2R0hz5xs.
[18] EPA Connectivity Report at B-48.
[19] *Id.* at 3-29.
[20] FEIS Vol. 2 at 465.
[21] *Id.* at 465 (citing 2008 Ephemeral Streams Report).
[22] EPA Connectivity Report at 3-23.

fish, wildlife, and plant propagules throughout the watershed."[23] EPA made the exact same determination in a 2008 report on intermittent and ephemeral streams in the Southwest, concluding that these water bodies are "hydrologically connected to downstream waters, and have a significant effect on the chemical, physical, and biological integrity of those waters."[24]

Similarly, a more recent study on connectivity in the arid Southwest concluded that these water bodies, and the riparian areas they sustain, "support the vast majority of wildlife species, are the predominant sites of woody vegetation including trees, and surround what are often the only available surface water sources, even if they are available only for limited periods."[25] They also provide riparian habitat that supports downstream rivers through shading, channel stabilization, nutrient cycling and inputs of aquatic organisms and other materials.[26] Ephemeral streams replenish sediment and alluvium, thereby protecting downstream channels and habitat.[27] Hydrologic models show that, in regions like the desert southwest, watersheds flow in small tributaries, reaching perennial streams and contributing the nutrients, seeds, and spawning areas that are necessary for the biological and aquatic health of those downstream perennial waters."[28] All of these dynamic processes work together to create a resilient watershed that sustains the physical, chemical, and biological integrity of downstream waters.[29]

Given the importance of the ephemeral and intermittent streams found at the Rosemont mine site to the health and viability of arid and semiarid ecosystems, EPA wrote the Corps a letter in 2017 explaining that "[e]phemeral and intermittent streams in arid environments perform the same critical hydrologic functions as perennial streams in wetter environments by moving water, sediment and debris through the stream network and providing connectivity within the watershed."[30] Thus, EPA concluded that the Rosemont Mine, by destroying an intricate network of headwater streams, "will significantly degrade downstream reaches of Davidson Canyon and Cienega Creek."[31]

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[23] *Id.* at B-59.

[24] 2008 Ephemeral Streams Report at 5, 72; *see also* 33 U.S.C. § 1251 ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."). In the 2008 report, EPA explained that "[e]phemeral and intermittent streams are the defining characteristic of many watersheds in dry, arid and semi-arid regions, and serve a critical role in the protection and maintenance of water resources, human health, and the environment." *Id.* at 2.

[25] David Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, J. AM. WATER RES. ASS'N 6 (2018) (attached as Exhibit 9).

[26] EPA Connectivity Report at B-4, B-55–B-58.

[27] *Id.* at B-59–B-60.

[28] 2008 Ephemeral Streams Report at 72.

[29] *See generally* Dr. Mark T. Murphy, Vigneto Expert Jurisdictional Report (June 2020) (attached as Exhibit 10). The Murphy Report provides an example of the ecological importance of and hydrological connection between the ephemeral streams, like that at the Rosemont mine site, and downstream perennial and traditional navigable waters.

[30] EPA 2017 Significant Degradation Letter at 9.

[31] *Id.* at 3.

B. The Forest Service's Approval and Fish and Wildlife Service's Biological Opinion for the Rosemont Mine Rely on Mitigation Measures and Analysis For the 404 Permit.

The Forest Service made its approval of the Rosemont Mine Plan of Operation contingent on Rosemont's receipt of a 404 Permit.[32] Both the Forest Service and the Fish and Wildlife Service relied on mitigation measures required by the Corps' 404 Permit for the mine. Should the Corps reverse the PJD for the mine, the Corps' action would undermine approvals by its sister agencies.

In the Final Environmental Impact Statement (FEIS) for the Rosemont mine, the Forest Service noted that the 404 Permit requires Rosemont to engage in compensatory and other mitigation activities for the loss of surface waters at the mine site.[33] For instance, the Forest Service explained that the Habitat Mitigation and Monitoring Plan (HMMP) required by the Corps' 404 Permit would mitigate impacts to seeps, springs, and riparian areas, stating that "[t]he lands proposed for conservation at Sonoita Creek Ranch would be at least partially effective at mitigating riparian resources by preserving and possibly creating new riparian habitat."[34] Thus, the mitigation measures required by the 404 Permit were integral to the Forest Service's conclusion that Rosemont would minimize impacts on this unique landscape and fragile watershed.[35]

The Forest Service also relied on the Corps' analysis of alternatives and impacts. The Forest Service stated repeatedly in the FEIS that alternatives analyzed would allow for the development of the Rosemont Mine in a matter that "is the least environmentally damaging practicable alternative," in accordance with the requirements of Section 404 of the Clean Water Act.[36] For its surface water quality impacts analysis, the Forest Service also heavily referenced the Corps' assessment of impacts on jurisdictional waters, stating that it used the Corps' 404(b)(1) alternatives analysis to "quantitatively assess direct and indirect impacts to potentially jurisdictional [waters of the U.S.]" and relied on the Corps' "authority to regulate activities under

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[32] FEIS Vol. 1 at 59; *see also* U.S. Forest Serv., Record of Decision: Rosemont Copper Project and Amendment of the Coronado Land and Resource Management Plan at 89 (2017) (excerpt attached as Exhibit 11).

[33] *See* FEIS Vol. 1 at xxxi (stating that mitigation measures relied on in the FEIS included those "identified in the CWA Section 404 individual permit and may include compensatory mitigation lands in Davidson Canyon and on Sonoita Creek, as well as transfer of water rights on Cienega Creek"); S. Pac. Div., U.S. Army Corps of Eng'rs, Department of the Army Permit: SPL-2008-00816-MB at 6–7 (2019) (including requirement that Rosemont comply with the HMMP) (attached as Exhibit 12).

[34] FEIS Vol. 2 at 568.

[35] FEIS Vol. 1 at 95–96 (describing monitoring and mitigation plan and reliance on various permits and authorizations for a comprehensive plan, including CWA 404 permit).

[36] *Id.* at 7; *id.* at 25, 27 (describing the "collaborative effort among all agencies to reach consensus on a range of reasonable alternatives").

Section 404 of the CWA to determine what constitutes direct and indirect impacts to [waters of the U.S.]"[37]

The Fish and Wildlife Service similarly relied on mitigation measures required by the Corps' 404 Permit when analyzing the impacts on endangered and threatened species in the area.[38] In the amended Biological Opinion for the mine, the Fish and Wildlife Service explained that "HMMP-related actions are considered conservation measures for effects to threatened and endangered species as an adjunct [to] their primary intended purpose as Clean Water Act mitigation measures."[39] Among the restoration activities included in the HMMP, the retirement and reseeding of an agricultural field at Sonoita Creek Ranch would result in "habitat benefits to a number of wildlife species," namely the threatened western yellow-billed cuckoo.[40] The Fish and Wildlife Service also stated that it relied on the HMMP's restoration and enhancement of two ponds at Sonoita Creek Ranch "to support recovery efforts for sensitive species," including the northern Mexican gartersnake, Chiricahua leopard frog, Gila Chub, Gila topminnow, and Huachuca water umbel.[41] "The full implementation of . . . conservation measures" required in the HMMP and relied upon by the Fish and Wildlife Service is "contingent on" the Corps' 404 Permit for the mine.[42]

Without a 404 Permit, Rosemont would no longer be required to complete the mitigation measures relied on by the Forest Service and the Fish and Wildlife Service in their analyses of the mine, undermining the Forest Service's approval and Fish and Wildlife Service's Biological Opinion. There would, thus, be no rational basis for the Fish and Wildlife Service's Biological Opinion or the Forest Service's Record of Decision. *See Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1154 (D. Ariz. 2002) ("Without these measures, there is no factual basis and no rational basis for the opinion."). The Corps must consult with these agencies before taking any action to reverse the PJD and revoke the 404 Permit. *See* 50 C.F.R. §§ 402.14(a), 402.16(a); *see also Scenic Coast v. Cal. Dep't of Transp.*, 204 F. Supp. 3d 1075, 1092 (N.D. Cal. 2016) ("The loss of this benefit necessarily implies that the project's net effect on listed species and their habitat will be greater than previously thought.").

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[37] FEIS Vol. 2 at 447; *id.* at 446 (explaining that the FEIS's methodology for assessing changes in water quality as a result of mine construction and operation included consideration of "dredged or fill material in [waters of the U.S.] under the CWA").

[38] Steven Spangle, Field Supervisor, Amended Final Reinitiated Biological and Conference Opinion for the Rosemont Copper Mine, Pima County, Arizona at 11 (2016) [hereinafter "Amended BiOp"] (noting that the HMMP and its implementation are "relevant to both the preceding Effects to Aquatic Ecosystems and Effects to Riparian Ecosystems …, as well as to effects analyses [for] individual threatened and endangered species") (excerpt attached as Exhibit 13).

[39] *Id.* at 12.

[40] *Id.* at 14.

[41] *Id.*

[42] *Id.* at 7.

C. Abdicating Jurisdiction Over the Ephemeral Streams at the Rosemont Mine Site Would Violate the Clean Water Act.

Congress enacted the Clean Water Act with a single objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). In drafting this provision, Congress took a "broad, systemic view" of maintaining and improving water quality, with the key word "integrity" referring "'to a condition in which the natural structure and function of ecosystems [are] maintained.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (quoting H.R. Rep. No. 92-911, at 76 (1972)). This comprehensive approach was essential because, as Congress recognized, water moves in "hydrological cycles." S. Rep. No. 92-414 at 77. Thus, "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *United States v. Deaton*, 332 F.3d 698, 707 (4th Cir. 2003).

Accordingly, to restore and maintain the Nation's waters, Congress sought to control water pollution at its source. *See* S.Rep. No. 92-414 at 77 (1972) ("[I]t is essential that discharge of pollutants be controlled at the source"). To that end, the CWA prohibits "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1362(12), 1311(a). The term "navigable waters" encompasses all waterbodies that have a "significant nexus" with a traditionally navigable water. *See Rapanos*, 547 U.S. at 779–80 (Kennedy, J., concurring). Under this definition, a stream possesses the requisite nexus if it, "either alone or in combination with" other similarly situated streams, "significantly affect[s] the chemical, physical, and biological integrity" of a traditionally navigable water. *Id.*; *United States v. Moses*, 496 F.3d 984, 986 (9th Cir. 2007).

Abdicating jurisdiction over the ephemeral and intermittent streams on the Rosemont Mine site would have a significant impact on the physical, chemical, and biological integrity of the Nation's waters. With respect to physical integrity, if the Clean Water Act does not apply to this site, Rosemont could bury this intricate network of tributaries under 1.9 billion tons of waste rock, obstructing "the very rush of water," *See Moses*, 496 F.3d at 989, conveyed by these tributaries during ordinary storm events and thereby impairing their ability to dissipate flood flows and filter pollutants. [43] In comments on Rosemont's 404 Permit, EPA explained that the discharge of toxic waste rock and mine tailings into the waters at the mine site "will result in direct and secondary adverse effects to the ecological functions at the discharge sites and in adjoining downstream tributaries through changes in flow patterns, water circulation, sediment storage and transport and various water quality parameters."[44]

In addition to these physical and chemical impacts, the Corps' exclusion of ephemeral tributaries from the protections of the Clean Water Act would degrade the biological integrity of the watershed. As EPA concluded, the fill activities at the mine site would "reduce aquatic plant

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[43] 2008 Ephemeral Streams Report at 14 (explaining that "the vast extent of . . . arid and semi-arid watersheds makes their runoff production significant, and their proper management important"); EPA Connectivity Report at 3-23.

[44] EPA 2017 Significant Degradation Letter at 2.

and animal species abundance and diversity, and disrupt normal functions of the aquatic ecosystem leading to significant reductions in overall biological productivity."[45]

A jurisdictional waiver would give Rosemont a free pass to circumvent its obligation to mitigate these adverse impacts to the chemical, physical, and biological integrity of the aquatic ecosystem. *See* 40 C.F.R. §§ 230.10(d), 230.91(a). This outcome is especially troubling for two reasons. First, the Corps has an obligation to ensure adequate mitigation to offset the unavoidable impacts of dredge and fill activities on waters of the United States. *Id.* § 230.03(a). It cannot grant a permit without ensuring that prerequisite has been met. *Id.* § 230.10(d). Second, both EPA and the Tribes have already documented the fatal flaws and inadequacies in Rosemont's proposed mitigation measures.[46] The Corps cannot disclaim jurisdiction over the site, circumvent these adverse findings, and thereby allow the unmitigated destruction of the Nation's waters.

For these reasons, both the Corp's Los Angeles District and EPA determined that the 404 Permit would cause significant degradation to the Nation's waters and was contrary to public interest.[47] These uncontroverted findings show that revoking jurisdiction over the site based on the Navigable Waters Rule would be inconsistent with the Act's objective and must be rejected as unreasonable. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring) (rejecting interpretation that would be inconsistent with the Clean Water Act's purpose); *Cty. of Maui, Haw. v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (rejecting interpretation of Clean Water Act that defied "the statutory purposes Congress sought to achieve.").

In fact, the Rule, by categorically eliminating Clean Water Act protections for ephemeral streams, would cause devastating impacts far beyond this case. The Rule would deprive the vast majority of surface waters in Arizona and the desert southwest of protection, including *all* of the similarly situated ephemeral tributaries that are "*critically important* to the chemical, physical, and biological integrity of the Nation's waters, particularly in the southwestern region of the United States."[48] Scientists have unequivocally concluded that eliminating protections for these ephemeral streams would have "severe and long-lasting negative consequences" for the Nation's

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[45] *Id.* at 17.

[46] *See generally* Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Envtl. Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Analysis of the Final Habitat Mitigation and Monitoring Plan Permit No. SPL-2008-00816-MB Rosemont Copper Project Dated September 12, 2017 (Nov. 30, 2017) (attached as Exhibit 14); *Tohono O'odham Nation, et al. v. Helmlinger, et al.*, No. 4:19-00205-FRZ, Complaint, Dkt. 1 ¶¶ 194–208, 320–26 (D. Ariz. 2019).

[47] Letter from Colonel D. Peter Helmlinger, Commander, S. Pac. Div., U.S. Army Corps of Eng'rs, to Patrick Merrin, Vice President Hudbay – Ariz. Business Unit, Rosemont Copper Co. at 1–2 (Dec. 28, 2016) (attached as Exhibit 15); *see generally* EPA 2017 Significant Degradation Letter.

[48] Memorandum from Alison Cullen, Chair, SAB WOTUS Work Group to Members of the Chartered SAB and SAB Liaisons, Re: Preparation for Chartered Science Advisory Board (SAB) Discussion of EPA's Proposed Waters of the U.S. (WOTUS) Rule at 3 (May 15, 2019) [hereinafter "SAB 2019 Memo"] (attached as Exhibit 16).

waters, a result directly contrary to the Clean Water Act's objective.[49] The Corps has failed to address this uncontroverted evidence.[50]

In addition to defeating the overall objective of the Clean Water Act, revoking the PJD over the streams on the Rosemont Mine site conflicts with the plain text of the Clean Water Act, as well as binding Supreme Court precedent.[51] As one federal court recently explained, "*Rapanos* is unambiguously against the construction offered in the plurality opinion, on which the New Rule is modeled." *See Colorado* Stay Order at 25. Justice Kennedy and the four-justice dissent wholly rejected Justice Scalia's attempt, which the Navigable Waters Rule adopts, to categorically eliminate jurisdiction over ephemeral streams based on the lack of "relatively permanent flows," concluding that such a novel limitation "is inconsistent with the Act's text, structure, and purpose." *Rapanos*, 547 U.S. at 768 (Kennedy, J., concurring); *see also id.* at 800–04 (holding that such a requirement is a "statutory invention" that creates "arbitrary jurisdictional lines."). This holding "unambiguously . . . forecloses" the Corps' attempt to resurrect a relatively-permanent-flow requirement, as it did in the Rule, let alone apply that test to the facts of this case. *See Colorado* Stay Order at 25 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

Given the extraordinary resources at risk here, EPA, not the Corps, has the authority to make a jurisdictional determination for the waters at the Rosemont mine site, in accordance with the Memorandum of Agreement between the Corps and EPA concerning determinations of jurisdiction under the 404 program.[52] As noted above, EPA concluded that the mine will cause significant degradation to waters, including Special Aquatic Sites, in and around the mine site,[53] making this a "special case" with "significant issues" that must be addressed under the Clean Water Act.[54]

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[49] Letter from S. Mažeika P. Sullivan, et al. to Andrew Wheeler, Administrator U.S. EPA at 2 (April 5, 2019) (attached as Exhibit 17); 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) ("[I]f these waters are polluted or destroyed, there is a significant effect downstream.")

[50] SAB 2019 Memo at 2; Letter from Dr. Michael Honeycutt, Chair Science Advisory Board to Andrew Wheeler, Administrator EPA (Feb. 27, 2020) (attached as Exhibit 18).

[51] *See* Letter from Jennifer Chavez, Earthjustice to EPA Docket Center (April 15, 2019) (attached as Exhibit 19).

[52] U.S. Army Corps of Eng'rs & Envtl. Prot. Agency, Memorandum of Agreement: Determination of Geographic Jurisdiction of the Section 404 Program and Application of Exemptions Under CWA Section 404(f) § III (1989), https://www.epa.gov/cwa-404/memorandum-agreement-determination-geographic-jurisdiction-section-404-program-and [hereinafter "1989 MOA"].

[53] *See* EPA 2017 Significant Degradation Letter.

[54] 1989 MOA § III.

D. Revoking Jurisdiction Would Create a Regulatory Void Leading to Unregulated and Unacceptable Impacts to the Nation's Waters.

Arizona depends on the Clean Water Act, and in particular the 401 Certification process,[55] to protect ephemeral streams from the unacceptable impacts of dredge and fill operations.[56] The Arizona Department of Environmental Quality (ADEQ) relied on this authority to condition Rosemont's proposal to discharge fill material into ephemeral streams on the mine site.[57] Among other things, ADEQ imposed a "surface water mitigation plan" to offset reductions in flows to downstream Outstanding Arizona Waters.[58] If, however, the Corps were to revoke its jurisdiction over the ephemeral streams on the mine site, it would eliminate Arizona's ability to use the 401 certification process to condition Rosemont's filling of ephemeral streams and enforce those requirements.

Revoking Clean Water Act jurisdiction would also foreclose ADEQ's ability to regulate Rosemont's dredge and fill activities under state law. As it stands, Arizona lacks any program to regulate fill activities in ephemeral streams. Moreover, Arizona law currently prohibits ADEQ from regulating discharges into ephemeral streams, unless they are covered by the Clean Water Act. *See* AZ Rev. Stat. § 49-104(A)(16). Thus, if the Corps acts to strip these streams of Clean Water Act protection, it would leave ADEQ with no authority under state law to protect them from the impacts of Rosemont's dredge and fill operations.[59]

Faced with this regulatory void, ADEQ pleaded with the Corps and EPA for a "delayed implementation" of the Rule because it lacked a "state-level program designed specifically to

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[55] Congress empowered states to approve, condition, or deny any 404 permits granted by the Corps. 33 U.S.C. § 1341(a)(1). This state certification requirement is "essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now § 401 was first proposed." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006).

[56] *See* U.S. EPA & Dep't of Army, Regulatory and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States" (Dec. 11, 2018), Appendix B at 73 (attached as Exhibit 20). Apart from the 401 Certification process, Arizona lacks any program to regulate the discharge of fill material into ephemeral streams.

[57] ADEQ, Clean Water Act Section 401 Water Quality Certification: U.S. Army Corps of Eng'rs Public Notice/Application No.: SPL-2008-00816-MB (2015) (attached as Exhibit 21).

[58] *Id.* at 6–7; Rosemont Copper Co., Surface Water Mitigation Plan (2014) (attached as Exhibit 22).

[59] In a recent slideshow, ADEQ depicted the current lack of any state law or program to regulate the discharge of fill material into ephemeral streams or any other waters no longer covered by the Clean Water Act. ADEQ, Arizona Surface Water Protection Program, PowerPoint Presentation to Scientific Advisory Group at 4 (April 22, 2020) (attached as Exhibit 23). Just last month, ADEQ released a draft proposal for new "Waters of the State" legislation that would provide limited coverage of ephemeral streams and create a limited state dredge and fill program. ADEQ, Request for Input: Discharges of Dredged or Fill Material (Nov. 19, 2020) (attached as Exhibit 24). Final enactment is still likely far off, with the legislative proposal having just entered the public input stage. *Id.*

protect and restore surface water quality."[60] By ADEQ's own estimate, the state needs until 2023, at the earliest, before it might have the legislative authority and regulatory program to control discharges into ephemeral streams.[61] The Corps must heed these requests and retain jurisdiction over the ephemeral streams on the Rosemont mine site.

E. The Corps Must Hold a Public Hearing and Engage in Consultation With the Tribes on Any Proposal to Reverse the PJD.

Before making any decision to modify or withdraw the PJD for the Rosemont mine, the Corps would have to undertake a substantial re-evaluation of its analysis and decision on the PJD and 404 Permit. In these circumstances, the Corps must make its new analysis available to the public and the Tribes, hold a public hearing on the analysis and reversal of the PJD, and engage in government-to-government consultation with the Tribes before making a new decision on the PJD and 404 Permit. Failure to do so would violate the National Environmental Policy Act (NEPA), the Clean Water Act, and the National Historic Preservation Act (NHPA).

NEPA requires agencies to ensure that environmental information is made available to the public "*before* decisions are made and *before* actions are taken." 40 C.F.R. § 1500.1(b) (emphasis added). NEPA also requires that an agency hold a public hearing "whenever appropriate or in accordance with statutory requirements applicable to the agency." *Id.* § 1506.6(c). The Clean Water Act provides that the Corps may issue a 404 permit only "after notice and opportunity for public hearings." 33 U.S.C. § 1344(a). Additionally, a hearing is required in connection with a 404 Permit whenever such "a public hearing is needed for making a decision on such permit." 33 C.F.R. § 327.4(a); *see also id.* § 327.3 (defining "public hearing" to mean a "proceeding conducted for the purpose of acquiring information or evidence which will be considered in evaluating a proposed [404] permit action," and defining "permit action" to mean "the evaluation of and decision on . . . the modification, suspension, or revocation of any [404] permit"). Requests for public hearing "shall be granted, unless the district engineer determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by a hearing." *Id.* § 327.4(b).

The Corps' new analysis of the PJD for the Rosemont mine would constitute new information on which the Corps would rely in determining whether to retain jurisdiction over the ephemeral and intermittent streams at the mine site or to revoke the 404 Permit. Thus, the Corps would be required to make its analysis available to the public and provide the public with an opportunity to comment on its new environmental analysis to "weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 953 (9th Cir. 2008). As noted above, the reversal of the PJD and a determination that the Corps lacks jurisdiction over the waters at the mine site would cause significant degradation of the aquatic environment, in violation of the Clean Water

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[60] Letter from Misael Cabrera, Director ADEQ to Andrew Wheeler, Administrator EPA at 5 (April 15, 2019) (attached as Exhibit 25).

[61] ADEQ, Arizona Surface Water Protection Program, PowerPoint Presentation to Scientific Advisory Group at 19 (April 1, 2020) (attached as Exhibit 26); *see also* ADEQ, Notes from Scientific Advisory Groups Meeting at 4 (April 1, 2020) (attached as Exhibit 27).

Act; undermine the Forest Service's approval and Fish and Wildlife Service's Biological Opinion for the mine; and leave a regulatory gap leading to unacceptable impacts on Arizona waters. Consequently, the Tribes raise specific factual issues demonstrating the need to hold a public hearing. 33 C.F.R. §§ 327.3, 327.4(a)–(b); 40 C.F.R. § 1506.6(c).

These impacts also require the Corps to engage in government-to-government consultation with the Tribes, in accordance with the NHPA, before taking any action to reverse the PJD or revoke the 404 Permit. The heart of the NHPA is section 106, which requires consultation between agencies and Indian Tribes on projects that could affect sites that are on, or could be eligible for, listing in the National Register of Historic Places, including sites that are culturally significant. 54 U.S.C. §§ 302706(a)–(b), 306108. The agency must ensure that the consultation process provides the tribe with a "reasonable opportunity to identify its concerns about historic properties . . . including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A). The Corps' own Tribal Consultation Policy defines consultation as an "open, timely, meaningful, collaborative and effective deliberative communication process that emphasizes trust, respect, and shared responsibility." U.S. Army Corps of Eng'rs, Tribal Consultation Policy § 3(b) (2012).

The Santa Rita Mountains, including the Rosemont mine site, is a landscape imbued with cultural significance for the Tribes. It is the location of sacred sites, ancestral villages and burials, and a source of plant, animal, and mineral resources critical to maintaining the Tohono O'odham Nation's culture.[62] In recognition of the area's importance to the Tribes, the Forest Service designated it as a Traditional Cultural Property and sought to list it on the National Register.[63] The Tribes also hold the unique waters that run throughout the mine site as sacred, as they bring special spiritual and ecological importance to the land.[64] Given the importance of the resources at risk, and the potentially devastating results should the Corps reverse the PJD for the mine site, the Tribes request consultation with the Corps should the agency proceed with any proposal to revoke Clean Water Act jurisdiction over the site. Specifically, the Tribes request that the Corps provide them with any new analysis of the waters at the mine site, as well as any other critical documents needed to ensure they are on an equal footing with the Corps, and an initial conversation by virtual meeting or telephone about the Corps' plans and the requisite consultation process. The consultation must recognize the government-to-government relationship between the Corps and the Tribes, and be conducted in a "sensitive manner respectful of tribal sovereignty" and the Tribes' distinctive needs. 36 C.F.R. § 800.2(c)(2)(ii)(B) & (C).

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[62] NRHP Registration Form at 3–15.
[63] *See generally id.*
[64] Ned Norris, Jr., Chairman and Wavalene M. Romero, Vice Chairwoman, Tohono O'odham Nation, Objection to the Rosemont Copper Project Final Environmental Impact Statement ("FEIS") and Proposed Record of Decision ("ROD"), Responsible Official: James Upchurch, Forest Supervisor, Coronado National Forest, Nogales Ranger District at 7–8, 21 (2014) (attached as Exhibit 28).

In light of the above, the Tohono O'odham Nation, Pascua Yaqui Tribe, and Hopi Tribe respectfully request that the Corps retain jurisdiction over the ephemeral streams on the Rosemont mine site.

Sincerely,

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EXHIBIT LIST

Ex.	Name
1	Suzanne Griset, SWCA Envtl. Consultants, William Gillespie, Coronado Nat'l Forest, and Mary Farrell, Trans-Sierran Archaeological Research, National Register of Historic Places Registration Form for Ce:Wi Duag ("Long Mountain" in O'odham) (2012)
2	Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Envtl. Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Environmental Consequences of the Proposed Rosemont Copper Mine: Significant Degradation to Waters of the United States (Nov. 30, 2017)
3	U.S. Forest Serv., Final Environmental Impact Statement for the Rosemont Copper Project Vol. 1 (2013) (Excerpted)
4	U.S. Forest Serv., Final Environmental Impact Statement for the Rosemont Copper Project Vol. 2 (2013) (Excerpted)
5	WestLand Resources, Inc., Preliminary Jurisdictional Determination for the Rosemont Project, Pima County, Arizona (2009)
6	Letter from C.H. Huckelberry, Cty. Adm'r, Pima Cty., Ariz., to William James, Nat'l Mining Expert, U.S. Army Corps of Eng'rs, and Kerwin Dewberry, Forest Supervisor, U.S. Forest Serv. (Sept. 28, 2017)
7	U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015)
8	Lainie Levick et al., The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid American Southwest (Nov. 2008)
9	David Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, J. AM. WATER RES. ASS'N (2018)
10	Dr. Mark T. Murphy, Vigneto Expert Jurisdictional Report (June 2020) (and supporting studies)
11	U.S. Forest Serv., Record of Decision: Rosemont Copper Project and Amendment of the Coronado Land and Resource Management Plan (2017) (Excerpted)
12	S. Pac. Div., U.S. Army Corps of Eng'rs, Department of the Army Permit: SPL-2008-00816-MB (2019)
13	Steven Spangle, Field Supervisor, Amended Final Reinitiated Biological and Conference Opinion for the Rosemont Copper Mine, Pima County, Arizona (2016) (Excerpted)
14	Letter from Nancy Woo, Assoc. Dir., Water Div., U.S. Envtl. Prot. Agency, to Edwin S. Townsley, Operations and Regulatory Div. Chief, S. Pac. Div., U.S. Army Corps of Eng'rs, Analysis of the Final Habitat Mitigation and Monitoring Plan Permit No. SPL-2008-00816-MB Rosemont Copper Project Dated September 12, 2017 (Nov. 30, 2017)
15	Letter from Colonel D. Peter Helmlinger, Commander, S. Pac. Div., U.S. Army Corps of Eng'rs, to Patrick Merrin, Vice President Hudbay – Ariz. Business Unit, Rosemont Copper Co. (Dec. 28, 2016)

16	Memorandum from Alison Cullen, Chair, SAB WOTUS Work Group to Members of the Chartered SAB and SAB Liaisons, Re: Preparation for Chartered Science Advisory Board (SAB) Discussion of EPA's Proposed Waters of the U.S. (WOTUS) Rule (May 15, 2019)
17	Letter from S. Mažeika P. Sullivan, et al. to Andrew Wheeler, Administrator U.S. EPA (April 5, 2019)
18	Letter from Dr. Michael Honeycutt, Chair Science Advisory Board to Andrew Wheeler, Administrator EPA (Feb. 27, 2020)
19	Letter from Jennifer Chavez, Earthjustice to EPA Docket Center (April 15, 2019)
20	U.S. EPA & Dep't of Army, Regulatory and Programmatic Assessment for the Proposed Revised Definition of "Waters of the United States" (Dec. 11, 2018), Appendix B
21	Ariz. Dep't of Envtl. Quality, Clean Water Act Section 401 Water Quality Certification: U.S. Army Corps of Eng'rs Public Notice/Application No.: SPL-2008-00816-MB (2015)
22	Rosemont Copper Co., Surface Water Mitigation Plan (2014)
23	ADEQ, Arizona Surface Water Protection Program, PowerPoint Presentation to Scientific Advisory Group (April 22, 2020)
24	ADEQ, Request for Input: Discharges of Dredged or Fill Material (Nov. 19, 2020)
25	Letter from Misael Cabrera, Director ADEQ to Andrew Wheeler, Administrator EPA (April 15, 2019)
26	ADEQ, Arizona Surface Water Protection Program, PowerPoint Presentation to Scientific Advisory Group (April 1, 2020)
27	ADEQ, Notes from Scientific Advisory Groups Meeting (April 1, 2020)
28	Ned Norris, Jr., Chairman and Wavalene M. Romero, Vice Chairwoman, Tohono O'odham Nation, Objection to the Rosemont Copper Project Final Environmental Impact Statement ("FEIS") and Proposed Record of Decision ("ROD"), Responsible Official: James Upchurch, Forest Supervisor, Coronado National Forest, Nogales Ranger District (2014)